

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

JAY FRANCO & SONS, Inc.,

Plaintiff,

v.

CLEMENS FRANEK,

Defendant.

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Civil Action No. 1:08-cv-01313

Consolidated with No. 1:08-cv-0058

Judge Dow

JURY DEMAND

DECLARATION OF CLEMENS E. FRANEK

My name is Clemens E. Franek and if I were sworn as a witness to the above-entitled cause would competently testify as follows:

1. This Declaration is based on my personal knowledge.
2. My name is Clemens E. Franek. I am the Defendant in the present litigation.
3. This Declaration is being submitted as an exhibit to my Response to a Motion for Partial Summary Judgment filed by J. Franco & Sons, Inc.
4. I am the owner of United States Trademark Registration No. 1,502,261. The trademark relates to a beach towel in a round shape ("Round Beach Towel Trademark").
5. I conceived of the idea of marketing and selling a round beach towel in around 1985. The first use of the mark was on August 15, 1985, and the first use of the mark in interstate commerce was on February 14, 1986.
6. The round beach towel trademark was originally in the name of CLM Design Inc. CLM used an assumed name of Son International. I was the President of CLM Design. CLM subsequently assigned the trademark to me, in my personal

capacity. CLM and I, individually and in conjunction with licensees, have used the mark continuously since the date of first use of the mark.

7. I have reviewed the exhibits attached to Franco's Motion for Partial Summary Judgment. These exhibits include a declaration of CLM's Vice-President, Glen Grunwald. That Declaration, Exhibit 23 to Franco's Motion, details some of the significant amount of money, resources and time devoted to advertising products incorporating the round beach towel up to that point in time. Further resources have been expended through the present date to market and sell round beach towels subject to the Round Beach Towel Trademark.
8. As the President of CLM Design and the originator of the round beach towel, I am familiar with the beach towel industry. I have been involved in designing, marketing and selling beach towels and specifically round beach towels since 1985. CLM Design adopted the round shape of the beach towel so the round towel's original, distinctive, and peculiar appearance would distinguish it from other beach towels and identify the beach towels as coming from a single source, namely Son International. At the time Son International began selling round beach towels, the vast majority of existing beach towels were rectangular or square in shape. Rectangular and square beach towels had been used for decades prior to our introduction of the round beach towel. To the best of my knowledge, no one was selling round beach towels prior to our introduction of the round beach towel.
9. The round beach towel is a design that is arbitrary, fanciful and ornamental. The design of the round beach towel is meant to be unique from a visual point of view

in order to distinguish the round beach towel from all other shapes of beach towels.

10. Son International advertised the unique shape of its round towel in all of its advertisements. Son International, in fact, advertised the round beach towel as “the most radical fashion item since the bikini.” See e.g., Franco’s Exhibit 6. Son International also advertised the round beach towel through such advertisements as “Bound to be Round” and “Don’t be Square.” Franco Exhibit 4.
11. Son International stated in an advertisement that “now when the sun moves, your towel doesn’t have to.” Franco Exhibit 23. That same advertisement emphasizes in large all capital letters “HUGE ROUND BEACH TOWEL” and states that the towel is a “LUXURIOUS ROUND BEACH TOWEEL – for LYING. NEARLY 6 FEET IN DIAMETER” The towel is touted in those ads as “The World’s Greatest Beach Towel” Those advertisements then state in smaller type face as follows: “Now when the sun moves, you don’t have to.” The focus of Son’s advertisement is on the large size and unique shape of the round beach towel. In addition the advertisements showed a large, round beach towel made by Son International. The round beach towel as stated in that advertisement was nearly 6 feet in diameter.
12. The ability to reposition a person’s body on a beach towel is dictated by the surface area of a beach towel, as opposed to its shape. For example, the average person could just as easily reposition that person’s body on a six-foot square beach towel as on a round towel. The same is true of the many shapes of beach towels currently available, such as animals, flowers, fish, etc.

13. Beach towels now come in many configurations. There are as many alternatives for the design of beach towels as one could imagine. Beach towels have traditionally been rectangular or square in shape. In addition, attached hereto as Group Exhibit "A" are examples of beach towels in many shapes, such as the shape of different animals, fish, flowers, dresses, surfboards, etc. The various configurations of beach towels are virtually endless. Each one of these towels, if provided the appropriate surface area, would allow a person to move about the towel without repositioning herself on the towel. Therefore, the surface area of the towel, as opposed to the shape of the towel, would allow one to move their body on the towel as the sun moves across the sky.
14. The round beach towels sold by Son International and subsequently by licensees and me, is made using square towel stock. The towel material is cut in a circular pattern and hemmed. There are no inherent advantages from a cost perspective in making a round beach towel. In fact, removing the amount of material from the towel stock results in considerable waste.
15. Making a towel into a round shape does not result in any advantage in quality of the product. The round towel is made of cotton, like the vast majority of other beach towels of various shapes and sizes.
16. Franco's exhibits reference several other companies that are selling round beach towels in Franco Exhibit 20. The first advertisement is from a company named "REI." I became aware that REI was selling round towels in February, 2008. On February 21, 2008, my attorneys in this regard sent a cease and desist letter to REI based on its infringement of its trademark. A copy of that letter is attached hereto

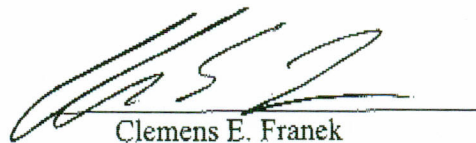
as Exhibit "B." We have since also sent letters of infringement to the other sellers of round beach towels identified in Franco's motion. Group Exhibit "C."

17. It is simply not true that a round beach towel consumes less physical space when the towel is folded up as opposed to towels of the same surface area. In fact, the shape of the round beach towel makes the towel more cumbersome to fold, and consumes more space than a traditionally shaped towel.

The statements set forth in this Declaration are true and correct to the best of my knowledge and belief, under penalties of perjury.

FURTHER AFFIANT SAYETH NOT

Dated: July 17, 2008



Clemens E. Franek